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No. 72-5704

In the Supreme Court of the United States

OCTOBER TERM, 1973

JEAN CHRISTIAN, ET AL., APPELLANTS

v.

NEW YORK STATE DEPARTMENT OF LABOR, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE FEDERAL APPELLEES

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Constitutional provisions, statutes and regulations involved	2
Statement	2
Summary of argument	6
Argument	10
Neither the Act nor the Due Process Clause requires that discharged federal employees be granted a hearing on the reasons for their removal from federal service for the purpose of determining their eligibility for unemployment compensation	10
A. Introduction	10
B. The Act does not require a hearing	12
C. The lack of a hearing does not deny discharged probationary employees due process or equal protection	17
1. Due process does not require a hearing	17
2. The lack of a hearing does not deny discharged federal probationary employees equal protection	23
Conclusion	29
Appendix	31

518-429—73——1

CITATIONS

Cases:

	Page
Board of Regents v. *Roth*, 408 U.S. 564	17, 18
Cafeteria Workers v. *McElroy*, 367 U.S. 886	18
Dandridge v. *Williams*, 397 U.S. 471	24
Dismuke v. *United States*, 297 U.S. 167	20–21
Eastern Airlines v. *Civil Aeronautics Board*, 185 F. 2d 426	16
Fuentes v. *Shevin*, 407 U.S. 67	17
Goldberg v. *Kelly*, 397 U.S. 254	20
Jaeger v. *Freeman*, 410 F. 2d 528	27
Jefferson v. *Hackney*, 406 U.S. 535	24
Jenkins v. *United States Post Office*, 475 F. 2d 1256, petition for writ of certiorari pending, No. 72–1665	18, 27
Levy v. *Woods*, 171 F. 2d 145	27
Lucas v. *Earl*, 281 U.S.C	17
Perry v. *Sindermann*, 408 U.S. 593	17, 19
Richardson v. *Belcher*, 404 U.S. 78	24
Sayah v. *United States*, 355 F. Supp. 1008	18
Smith v. *District Unemployment Compensation Board*, 435 F. 2d 433	28
Torres v. *New York State Department of Labor*, 321 F. Supp. 432, vacated, 402 U.S. 968, adhered to, 333 F. Supp. 341, affirmed, 405 U.S. 949	22
Constitution, statutes and regulations:	
United States Constitution, Fifth Amendment	2, 31
Civil Service Act of 1883, ch. 27, 22 Stat. 403, *et seq.*	
22 Stat. 404	26–27
Ex-Servicemen's Act of 1958, 72 Stat. 1088, *et seq.*, as amended, 5 U.S.C. 8521, *et seq.*:	
5 U.S.C. 8523	25

Constitution, statutes and regulations—Continued
Social Security Act of 1935, 49 Stat. 620, 42 U.S.C. 301 *et seq.*:
Page
42 U.S.C. 501 ... 33
42 U.S.C. 502(a) ... 24
42 U.S.C. 503(a) ... 4, 13, 23, 33
42 U.S.C. 1101(c) ... 24
Social Security Act Amendments of 1950, 64 Stat. 477, 495, as amended, 42 U.S.C. 410 ... 14
5 U.S.C. 7501 ... 5, 13
5 U.S.C. 7501(b) ... 14
5 U.S.C. 7511 ... 5, 14
5 U.S.C. 8502 ... 3, 20, 31
5 U.S.C. 8502(a)(1) ... 3
5 U.S.C. 8502(b) ... 3
5 U.S.C. 8502(d) ... 4, 13
5 U.S.C. 8503(c) ... 13
5 U.S.C. 8504 ... 3
5 U.S.C. 8506 ... 13, 17, 28, 31–32
5 U.S.C. 8506(a) ... 3, 5, 12, 21, 25, 31–32
5 U.S.C. 8508 ... 32
Labor Law, 30 McKinney's Consol. Laws of N.Y. Ann., § 593 (1965 ed.) ... 6
Civil Service Commission Regulations:
5 C.F.R. 6.4 ... 26
5 C.F.R. 315.804 ... 5, 14, 26
5 C.F.R. 752.103(a) ... 26
5 C.F.R. 752.202 ... 23, 26
5 C.F.R. Part 772 ... 26
5 C.F.R. 772.305(a) ... 26
Department of Labor Regulations:
20 C.F.R. 609.5 ... 33
20 C.F.R. 609.6 ... 3, 22, 25, 26
20 C.F.R. 609.7 ... 22, 33
20 C.F.R. 609.7–609.9 ... 25
20 C.F.R. 609.8 ... 21, 34

Labor Law, etc.—Continued
Department of Labor Regulations—Con. Page
20 C.F.R. 609.9 ..... 22, 34
20 C.F.R. 609.10 34
20 C.F.R. 609.18 ..... 24, 28, 34
20 C.F.R. 609.19 3
20 C.F.R. 609.20 ..... 4, 24, 35
20 C.F.R. 609.22 ..... 4, 21, 25, 36
20 C.F.R. 609.22–609.24 25
20 C.F.R. 609.23 ..... 4, 36
20 C.F.R. 609.23(a) 22
20 C.F.R. 609.24 ..... 4, 37
20 C.F.R. 609.25 38
20 C.F.R. 609.26 38
20 C.F.R. 614.8 25
Miscellaneous:
100 Cong. Rec. 10065 14
100 Cong. Rec. 10079 14
K. Davis, *Administrative Law Text* (3d ed. 1972), pp. 331–341 14
Hearings on Unemployment Insurance, H.R. 6537, 6539, 7054, 8857, and 8585 before the House Committee on Ways and Means, 83d Cong., 2d Sess 13, 15, 17
H. Rep. No. 1300, 81st Cong., 1st Sess 14
H. Rep. No. 2771, 81st Cong., 2d Sess 14, 15, 17
S. Rep. No. 1669, 81st Cong., 2d Sess 14

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OPINION BELOW

The opinion of the three-judge district court (A. 62-77) is reported at 347 F. Supp. 1158.

JURISDICTION

The judgment of the district court was entered on July 24, 1972 (A. 62, 70). Notice of appeal was filed on September 15, 1972 (A. 3, 78), and the jurisdictional statement was filed on November 14, 1972. This Court noted probable jurisdiction on April 16, 1973 (A. 80). The jurisdiction of this Court rests on 28 U.S.C. 1253.

QUESTION PRESENTED

Whether either the Unemployment Compensation for Federal Employees Act, 5 U.S.C. 8501 *et seq.*, or the Due Process Clause of the Fifth Amendment requires that discharged federal probationary employees be afforded a hearing on the reasons for their removal from federal service, for the purpose of determining their eligibility for unemployment compensation.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The relevant constitutional provisions, federal statutes, and regulations are set forth in the Appendix, *infra*, pp. 31–38.

STATEMENT

Appellants are former federal probationary employees who were denied benefits under the Unemployment Compensation for Federal Employees Act, 5 U.S.C. 8501 *et seq.* They brought this class action in the district court, seeking declaratory and injunctive relief against provisions of the Act and its implementing regulations which operated to deny them a hearing on the reasons for their removal from federal service, for the purpose of determining their eligibility for unemployment compensation (A. 4–14). Appellants alleged that the Act requires such a hearing and, alternatively, that the denial of a hearing deprived them of both due process and equal protection.

1. The Unemployment Compensation for Federal Employees Act establishes a federally-financed program of unemployment compensation for civilian em-

ployees of the federal government. The states administer this program under agreements with the Secretary of Labor. See 5 U.S.C. 8502.[1] Pursuant to such an agreement, a state acts "as agent of the United States" (5 U.S.C. 8502 (a) (1)) in administering the program for federal employees whose federal service and wages were "assigned" to the state for that purpose under 5 U.S.C. 8504.

Upon the termination of a federal employee's service, he may apply to the state for unemployment compensation. Upon receiving his application, the state requests his prior employer, the federal employing agency, to submit certain information necessary to the processing of the unemployment compensation claim. This information, generally referred to as the "federal findings," includes (5 U.S.C. 8506 (a)):

> (1) the federal service the employee performed;
>
> (2) the periods of federal service;
>
> (3) the amount of federal wages; and
>
> (4) the reasons for termination of federal service.

These findings are transmitted to the state within four business days after its request. 20 C.F.R. 609.6.

The state then determines whether the applicant is entitled to compensation. 20 C.F.R. 609.19. This determination is based upon state law. 5 U.S.C. 8502(b). The federal findings with respect to reasons for termination are purely factual; they involve no conclusions of law. Whether the facts recited in those findings dis-

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[1] The Secretary of Labor directly administers the program for the Virgin Islands.

qualify an applicant for unemployment compensation is a matter of state law which the state decides.

The state must promptly notify the applicant of its determination respecting his eligibility, and in doing so it must "set forth the Federal findings in sufficient detail to enable the Federal civilian employee to determine whether he wishes to request reconsideration or correction of any such findings." 20 C.F.R. 609.20.

Upon receipt of the state determination, an applicant may request his federal employing agency to reconsider and correct the findings regarding his termination of service. 20 C.F.R. 609.23. He may obtain from that agency additional information concerning the basis of its findings (20 C.F.R. 609.22) and in support of his request for correction he may submit to the agency any written information, including affidavits and other documentary evidence, that he deems relevant. 20 C.F.R. 609.23. "The Federal agency promptly shall correct any errors or omissions in its Federal findings and shall affirm, modify, or reverse any or all of its Federal findings in writing." 20 C.F.R. 609.9. These corrected findings are promptly transmitted to the state, which must then redetermine the applicant's eligibility for compensation. 20 C.F.R. 609.24.

If, on the other hand, upon the denial of compensation the applicant has no quarrel with the correctness of the federal findings but instead believes that certain state findings, or the state's application of state law to the federal findings, were erroneous, he may request a hearing before the state. See 5 U.S.C. 8502(d) and 42 U.S.C. 503(a)(3). But the federal

findings are "final and conclusive" for purposes of this hearing. 5 U.S.C. 8506(a).

2. This case arises out of appellants' applications for unemployment compensation under the Act. Appellants had been discharged from federal service during the first-year probationary period of their employment (A. 44, 46). In accordance with established civil service procedures, they were notified of the reasons for their termination, but they received no hearing on whether their terminations were for cause (A. 44, 46, 47, 52). See 5 U.S.C. 7501, 7511; 5 C.F.R. 315.804.

Appellants applied for unemployment compensation with appellee New York State Department of Labor (the "state") (A. 44, 46), which administers the unemployment compensation program under the Act for federal employees "assigned" to New York for that purpose. The state requested appellants' federal employing agencies to submit the findings required by 5 U.S.C. 8506(a).

Those findings stated that appellant Christian had been dismissed because of an unsatisfactory attendance record (A. 44) and that appellant Green, a sky marshal for the Bureau of Customs, had been discharged for violating a rule against the consumption of alcoholic beverages within 24 hours of flight duty (see A. 46, 11). The state determined, on the basis of these findings, that both appellants had been discharged for "misconduct in connection with [their] employment" and that they were therefore ineligible for unemployment compensation under local law (A.

518-429—73——2

27–28, 31). Labor Law, 30 McKinney's Consol. Laws of N.Y. Ann., § 593 (1965 ed.).

Appellants did not request their respective employing agencies to reconsider or correct the findings respecting the reasons for their termination of service, nor did they submit any written material designed to refute the grounds given for termination. They pursued solely state remedies in contesting the denial of unemployment compensation, and in each case the state ultimately denied compensation.

3. Appellants then brought this suit. The three-judge district court, with one judge dissenting, held that the current federal practice for making and correcting findings is consistent with the requirements of the Act and did not deprive appellants of either due process or equal protection.[2] The dissenting judge, without reaching the constitutional issues, concluded that the Act entitles federal probationary employees to a hearing on any findings which affect their rights to receive unemployment compensation.

SUMMARY OF ARGUMENT

The question in this case is whether without a hearing a federal employing agency may make findings with respect to the reason for the discharge of a federal probationary employee which are binding upon a state for purposes of determining the discharged employee's right to unemployment compensation. The federal agency does not need a hearing in order to

[2] The court also held that it lacked jurisdiction to consider the constitutional claims against the federal appellees. However, we do not challenge this Court's jurisdiction to consider those claims.

state the reasons why it discharged the employee; it needs only to consult its own records to do so. Appellants' real objective in seeking a hearing is to litigate the validity of their discharges. It is well settled, however, that probationary employees may be discharged without a hearing. Appellants cannot litigate collaterally the issue which they are barred from litigating directly.

A

The Unemployment Compensation for Federal Employees Act broadly delegates to the Secretary of Labor the responsibility for determining the procedures under which federal employing agencies are to make findings for unemployment compensation purposes. By its terms, the Act does not require that those procedures include a hearing. This omission is particularly significant in light of the facts that during consideration of the Act the attention of Congress was directed to the particular needs of probationary employees, who may be discharged without a hearing, and that when Congress has intended to require hearings for unemployment compensation purposes it has expressly so stated.

B

1. The denial of unemployment compensation to appellants did not affect any "property" interest entitled to due process protection. Appellants' interest in unemployment compensation was created together with the procedures which give it effect; that interest and those procedures must be read together as the basic rules and understandings defining the dimen-

sions of appellants' statutory entitlement to compensation. Denial of compensation in accordance with those procedures does not implicate due process protections. In any event, the procedures prescribed by the Secretary satisfy elementary standards of fairness. A discharged employee is afforded ample opportunity—an opportunity appellants ignored—to know the basis of his employing agency's proposed findings and to contest the accuracy of those findings in writing and through the submission of affidavits and other documentary evidence. Since appellants failed to take advantage of these procedures, through which they might have been able to persuade their agencies that the stated grounds for their discharge were incorrect, they cannot now complain because an evidentiary hearing was not also provided.

The existing procedures strike a reasonable balance between the need for accurate and expeditious processing of unemployment claims and the legitimate interests of the federal employing agencies. Full-blown hearing procedures would pose an unreasonable burden on those agencies and would entail unjustifiable interference with the employing agency's autonomy in dealing with probationary employees.

2. The differences in treatment between, on the one hand, discharged federal probationary employees and, on the other, private employees, permanent federal employees in the competitive service and resigning federal employees, all have a reasonable basis; appellants have not been denied equal protection.

a. Federal and non-federal employees are covered by different unemployment compensation programs

established at different times. In legislating with respect to the federal employment relationship, Congress need not establish strict comparability with general welfare provisions. Moreover, unlike an independent fact-finding tribunal such as a state unemployment compensation agency, the federal employing agency is reporting facts of which it has direct knowledge; flexible, informal investigative procedures can be effectively used in such circumstances.

b. The Secretary's regulations treat probationary and permanent employees alike. Findings are made, normally without a hearing, immediately upon the request of the state agency. However, for the completely separate purpose of the civil service tenure rules, permanent employees in the competitive service are entitled to a hearing at which they may challenge the lawfulness of their discharge. Subsequent to such a hearing, a federal employing agency may make corrections in its unemployment compensation findings. Thus the difference in hearing rights between permanent and probationary employees to which appellants object stems not from the Act but from the traditional tenure distinction between such employees, a distinction which appellants do not challenge.

c. Federal employees who resign are entitled to have their unemployment compensation findings based upon a hearing at which they personally appear. A departure from the normal internal procedures for determining the reasons for termination of service is necessary in the cases of such employees, for only they can explain the reasons for their own resignations.

ARGUMENT

NEITHER THE ACT NOR THE DUE PROCESS CLAUSE REQUIRES THAT DISCHARGED FEDERAL EMPLOYEES BE GRANTED A HEARING ON THE REASONS FOR THEIR REMOVAL FROM FEDERAL SERVICE FOR THE PURPOSE OF DETERMINING THEIR ELIGIBILITY FOR UNEMPLOYMENT COMPENSATION

A. INTRODUCTION

Under settled principles discussed below (*infra*, p. 27), the federal government may discharge probationary employees during their probationary period without a hearing. Appellants do not directly challenge this authority. Although apparently recognizing that their discharge without a hearing was proper, they contend that they were entitled to a hearing before the federal government could make findings, binding upon the state for purposes of determining their eligibility for unemployment compensation, with respect to the reason for their discharge.

The determination of the reason for the discharge of a probationary employee involves no factual issue requiring a hearing. The federal agency knows the reasons for its action, and in order to state them it need only consult its own records. Appellants' real contention is not that the federal agencies incorrectly stated the reasons which led the agencies to discharge appellants, but that such discharges were improper.

In other words, appellants are seeking to use the procedure for determining their right to unemployment benefits as a means for collaterally attacking the termination of their probationary employment. Appellant Christian, for example, is obviously not contending that the actual basis for her discharge was

not, as the agency stated, her unsatisfactory attendance record. Her argument, rather, is that in fact her attendance was not unsatisfactory, and that her discharge therefore was improper. Appellants are thus seeking a hearing to litigate indirectly an issue which, as probationary employees, they could not directly litigate, namely, the validity of their discharges.

Although appellants purportedly are not challenging the validity of their discharges, that is the necessary effect of the remedy they seek. Suppose, for example, that the federal agencies were required to hold hearings before they could make findings, binding on the state for purposes of determining appellant's right to unemployment compensation, with respect to the reasons for appellants' discharges. Suppose, further, that after such hearings the federal agencies found that appellant Christian did not have an unsatisfactory attendance record and that appellant Green had not consumed alcoholic beverages within 24 hours of flight duty.

Those findings would result in appellants being entitled to unemployment benefits under state law. But such findings also would show that appellants' probationary employment had been improperly terminated. It would be difficult or impossible for the federal agency thereafter to refuse to restore appellants to the employment from which, it had held, they had been improperly discharged. Thus, the consequence of permitting probationary employees to litigate the reasons for their discharge, ostensibly merely to determine their eligibility for unemployment bene-

fits, would be to overturn the settled principle that a probationary employee does not have the right to contest the propriety of his discharge.

It is in the light of these considerations that appellants' statutory and constitutional arguments must be evaluated.

B. THE ACT DOES NOT REQUIRE A HEARING

The district court correctly determined that, as a matter of statutory construction, the federal appellees had no duty to provide a hearing on the reasons for appellants' discharges. The pertinent statutory provision, 5 U.S.C. 8506(a), provides only that the federal employing agency shall make "findings" concerning, *inter alia*, "the reasons for termination of Federal service," that such findings are to be made "in the form and manner prescribed by regulations of the Secretary [of Labor]," that those "regulations shall include provision for correction by the employing agency of errors and omissions," that the findings are to be transmitted to the appropriate state agency, and that they are to be "final and conclusive." In delegating to the Secretary the responsibility for determining the manner in which the employing agency's findings are to be made, Congress did not require a hearing.

The only stated limitation on the Secretary's discretion to select appropriate fact-finding procedures is the requirement that there be provision for correction of errors. This is not a hearing requirement. The omission of a hearing requirement is significant, for when Congress has intended to require hearings for unem-

ployment compensation purposes, it has expressly so provided. See 5 U.S.C. 8503(c); 42 U.S.C. 503(a)(3).[3] Accordingly, the natural reading of 5 U.S.C. 8506, as even the dissenting judge below conceded (A. 75), is that the Secretary has been granted authority to select the fact-finding process—either including or excluding an adversary hearing—which in his view would best accord with the interests of claimants in expeditious but fair processing and of the federal employing agencies in administrative flexibility and some autonomy in employment matters.

Congress knew that not all federal employees were given a hearing prior to discharge, and the legislative history shows that it did not intend to superimpose new procedural requirements over normal discharge procedures. In considering the Act, Congress was concerned with the status of probationary employees, who were particularly susceptible to discharge and therefore peculiarly in need of unemployment protection. The Chairman of the Civil Service Commission testified (Hearings on Unemployment Insurance, H.R. 6537, 6539, 7054, 8857 and 8585 before the House Committee on Ways and Means, 83d Cong., 2d Sess., at 116):

[3] Those provisions require the agency administering the unemployment insurance program to provide a "fair hearing." 5 U.S.C. 8503(c) applies in those instances when the unemployment compensation program is being administered by the Secretary. 42 U.S.C. 503(a)(3) applies, by virtue of 5 U.S.C. 8502(d), in cases where the program is administered by a state agency. However, the findings made by the federal employing agency under 5 U.S.C. 8506 are "final and conclusive" for purposes of the statutory "fair hearing." See pp. 4–5, *supra*. Thus it was intended that the findings of the employing agency are to be made prior to and independently of that "fair hearing."

> There are now more than 600,000 indefinite and temporary Federal workers. Turnover is particularly heavy in this group of employees who are most vulnerable in reductions of force * * *. They * * * have no retirement contributions to withdraw, and generally can save little or no leave to tide them over unemployment.[4]

The problems of temporary or probationary employees were also discussed during floor debate in the House. 100 Cong. Rec. 10065 (Congressman Reed), 10079 (Congressman Springer). At the same time, Congress presumably was aware of its own legislation, 5 U.S.C. 7501 and 7511, permitting probationary employees, and other federal employees not in the competitive service, to be discharged without cause and specifically providing that, even in cases of discharge for cause, "[e]xamination of witnesses, trial, or hearing is not required." 5 U.S.C. 7501(b). The long-standing administrative practice under Civil Service Commission regulations, of which Congress also must have been aware, had been to discharge probationary employees without a hearing. 5 C.F.R. 315.804.

Thus in delegating authority to the Secretary to prescribe the fact-finding procedures to be employed under the Act, Congress was aware both of the job insecurity of probationary employees and of the sum-

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[4] The Commissioner referred to the fact that Congress in 1950 had amended the Social Security Act (64 Stat. 495) to extend old-age and survivors insurance benefits specifically to probationary federal employees, who were not subject to the civil-service retirement program applicable to tenured federal employees. See H. Rep. No. 2771, 81st Cong., 2d Sess., 21–22, 96; S. Rep. No. 1669, 81st Cong., 2d Sess., 16, 86, 88, 219–220; H. Rep. No. 1300, 81st Cong., 1st Sess., 128–129.

mary discharge procedures to which they are subject. Yet in providing greater economic security for such employees, Congress indicated no intention of changing or adding to normal discharge procedures. To the contrary, it was understood that administration of the Act would not significantly affect "existing operating methods and procedures." Hearings, *supra*, at 55. In these circumstances it is unlikely that Congress would have imposed the additional requirement of a hearing without specifically considering the matter and then making its will explicit. There is nothing in the legislative history, however, even suggesting the intention to require a hearing.

In contending that the Act requires hearings with respect to the reasons for termination of federal service, appellants cannot rely upon either its text or its legislative history. Their statutory claim is little more than that Congress should have required hearings as a matter of good policy and that this Court should indulge in what the district court characterized as "a tortured, strained and unnecessary interpretation" (A. 67) to accomplish a result which the Congress rejected. But policy determinations of that kind, unless of constitutional dimension (see pp. 17–28, *infra*), are matters for the Congress.

The true nature of appellants' argument is shown by their resort to broad generalizations concerning presumed legislative intent. These generalizations—about providing "sustenance and temporary security to unemployed workers" (Br. 42–43), "maximizing the opportunity to look for work" (Br. 44), and "providing to all covered federal employees the same fa-

vorable conditions of employment as are provided to other covered employees" (Br. 50)—shed little light on the narrow question of statutory interpretation involved here. But underlying appellants' generalizations is the implication that the administrative determination of why an employee has been fired is somehow inherently suspect or unfair unless based on an adversary hearing, and that Congress therefore may not be presumed to have contemplated non-hearing procedures in a remedial statute. As noted above, however, (p. 10, *supra*), the administrative determination can be simply and objectively made on the basis of the agency's own records.

Appellants' analysis of the statutory text is similarly unfruitful. They suggest, first, that the word "findings" necessarily implies that the findings be made after a hearing. Although, as they state (Br. 54), that word frequently "denote[s] determinations made after a hearing," factual determinations embodied in findings are also frequently reached without a hearing. "Findings" merely describes the end result of a fact-finding procedure; it is neutral as to the particular kind of fact-finding process employed. See K. Davis, *Administrative Law Text,* pp. 331–341 (3d ed. 1972). It is a word that must be read in context, and the context here is one of broad discretion in the Secretary to specify the fact-finding procedure. Cf. *Eastern Airlines* v. *Civil Aeronautics Board,* 185 F. 2d 426, 428 (C.A.D.C.).

Appellants further contend that Congress could not have intended administrative findings not based upon a hearing to be "final and conclusive." But the nature

of what the agency "finds"—the findings are merely a statement of the agency's reasons for discharging the employee—would make it inappropriate for the state to re-examine the determination. Another reason the findings were made "final" was because "these findings involve questions of Federal employment and wages which require uniform application at the Federal level, rather than interpretation by 51 non-Federal jurisdictions." Hearings, *supra*, at 16, 55.

Finally, appellants contend that a hearing requirement should be read into 5 U.S.C. 8506 in order to avoid constitutional questions. But such a reading of the statute would involve such "attenuated subtleties" (*Lucas* v. *Earl*, 281 U.S. 111, 114) that it should be resorted to only if giving effect to its stated language would make it unconstitutional. As we now show, the absence of a hearing does not invalidate the statute.

C. THE LACK OF A HEARING DOES NOT DENY DISCHARGED PROBATIONARY EMPLOYEES DUE PROCESS OR EQUAL PROTECTION

1. *Due process does not require a hearing.* Appellants contend (Br. 18–29) that the lack of a hearing respecting the reasons for their discharge denied them procedural due process. But a full trial-type hearing is not constitutionally required in all cases where government action affects individual interests. This Court's recent decisions make it clear that the due process clause is applicable only if an individual interest in "property" or "liberty" is at stake. *Board of Regents* v. *Roth*, 408 U.S. 564, 571–572, 577; *Perry* v. *Sindermann*, 408 U.S. 593, 599, 601–602; *Fuentes* v. *Shevin*, 407 U.S. 67, 90, n. 21.

Appellants make no claim that their removal from federal service or the subsequent denial of unemployment compensation affected their protected "liberty" interests.[5] Appellants' removal from federal service implicated no "property" interests entitled to due process protection, since federal probationary employees have no "legitimate claim of entitlement" (*Roth, supra,* 408 U.S. at 577) to continued government employment. See, *e.g., Jenkins* v. *United States Post Office,* 475 F. 2d 1256, 1257 (C.A. 9), petition for a writ of certiorari pending, No. 72–1665; *Sayah* v. *United States,* 355 F. Supp. 1008, 1015–1016 (C.D. Cal.). Cf. *Cafeteria Workers* v. *McElroy,* 367 U.S. 886. Appellants' argument is, rather, that they have a statutory right to unemployment compensation benefits, and that this "property" interest entitles them, as a matter of constitutional due process, to a hearing on the reasons for termination of their federal service.

This argument, however, is in reality an attack upon either the summary termination of appellants' probationary employment or upon the congressional determination to permit the states to apply state standards in denying unemployment compensation to certain categories of employees—here, those discharged for misconduct. The former authority, as we

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[5] Removal from federal service may affect an employee's "liberty" only when it is accompanied by charges which "seriously damage his standing and associations in his community * * * or impose * * * a stigma or other disability [foreclosing him from] other employment opportunities." *Board of Regents* v. *Roth, supra,* 408 U.S. at 573.

have shown, is well settled. The answer to the latter claim is that if Congress may permit probationary employees to be summarily discharged—and we repeat that appellants do not contend otherwise—it also may permit the states to apply their own standards governing eligibility for unemployment compensation.

A state certainly may deny unemployment benefits to someone whose unemployment is the result of his own misconduct. Appellants may litigate in the state proceeding the question whether the ground upon which their federal employment was terminated constitutes misconduct under state law. But due process does not require that they be permitted indirectly to litigate the validity of that termination. The claim cannot be magnified into one of constitutional dimension by framing it in terms of a right to unemployment benefits that cannot be cut off without a hearing.

Moreover, the scope of any constitutionally protected property interest that appellants may have in unemployment benefits depends upon the "rules and understandings" which establish, define, and circumscribe it. See *Perry* v. *Sindermann, supra,* 408 U.S. at 602. The substantive right to unemployment compensation conferred by the Unemployment Compensation Act is integrally related to and defined by the procedural limitations Congress imposed on that right, including the procedures for making the findings related to federal employment. Denial of unemployment compensation in accordance with those procedures did not deny appellants any constitutionally protected rights, since such denial merely reflected the limita-

tion on the right to unemployment compensation that the statute creating the right itself imposes.[6]

This Court has long recognized these principles, and the limitation they place on the requirements of due process, in cases involving the creation by the government of claims against itself. See *Dismuke* v. *United States*, 297 U.S. 167. This is such a case: the unemployment compensation appellants seek is a claim against the federal fisc which arises by virtue of the prior employment relationship between the claimant and the federal government.[7] Congress could have made appellants' administrative remedy exclusive, with no right to judicial review. *Dismuke* v. *United*

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[6] This is not a case like *Goldberg* v. *Kelly*, 397 U.S. 254, where continuing receipt of a benefit was being terminated. *Goldberg* turned upon the inadequacy of a post-termination fact-finding process since "termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits." 397 U.S. at 264 (emphasis in the original). Appellants here did not have benefits terminated and we do not understand them to complain of the delay incident to the beginning of benefits caused by New York's procedures. Any such complaint, resting upon an extension of *Goldberg's* rationale, would be directed at state rather than federal law. New York law postpones the receipt of unemployment benefits pending administrative redetermination of the applicant's eligibility. It could just as well, so far as the federal statute is concerned, provide for the payment of benefits subject to termination after a state hearing upon whether the facts found by the federal employing agency constituted "misconduct in connection with his employment" under state law. In short, we think no *Goldberg* problem exists here, and, if one does, it is created by state rather than federal procedures.

[7] Although the State administers the unemployment compensation program, it does so as the agent of the federal government, which pays the costs of the program. 5 U.S.C. 8502.

States, supra, 297 U.S. at 171–172. Congress stopped short of making the administrative remedy wholly exclusive here, but it did vest in the federal employing agency sole authority to make certain findings in accordance with procedures to be prescribed by the Secretary, which findings themselves are final and conclusive.

Appellants fare no better even if one assumes, *arguendo,* that due process protections are implicated by the deprivation of an interest in accordance with procedures established along with that interest. In such circumstances due process requires only procedures "which satisf[y] elementary standards of fairness or reasonableness essential to the due conduct of the proceeding which Congress had authorized." *Dismuke* v. *United States, supra,* 297 U.S. at 172. The Secretary's regulations satisfy those standards and provide discharged probationary employees with reasoned consideration of the facts relevant to their unemployment compensation claims.

As explained above (*supra,* pp. 4, 12), the Secretary's regulations governing unemployment compensation satisfy the statutory requirement that they provide "for correction by the employing agency of errors and omissions." 5 U.S.C. 8506(a). A discharged probationary federal employee is informed of "the basis for [the] Federal finding[s]," and he may obtain "more specific information" from the employing agency if he believes the initial findings are unclear or incomplete. 20 C.F.R. 609.22 and 609.8. A discharged employee may request his agency to reconsider and correct its findings, and he may submit any

information he deems relevant to the determination of the reasons for his removal. 20 C.F.R. 609.23(a), 609.9 and 609.7.

Although these informal procedures do not constitute a trial-type hearing, they do give discharged employees ample opportunity to know the basis for the employing agency's determinations, to present their contentions concerning the reasons for their dismissal, and to contest the accuracy of proposed findings. Those procedures, amounting to a hearing on a paper record, adequately protect the discharged employee's interest in receipt of unemployment compensation. Cf. *Torres* v. *New York State Department of Labor,* 321 F. Supp. 432 (S.D.N.Y.), vacated, 402 U.S. 968, adhered to, 333 F. Supp. 341, affirmed, 405 U.S. 949.

These procedures provide a reasonable balance between the employee's interest in a prompt and correct determination of the reasons for his discharge and the employing agency's interest in retaining flexibility and a certain degree of autonomy in dealing with employees. The Secretary's regulations facilitate expeditious handling of the employee's unemployment compensation claim by requiring that the employing agency make its findings and transmit them to the state immediately—within four business days of the state's request. 20 C.F.R. 609.6. The receipt of unemployment compensation benefits would be substantially delayed if a federal hearing were required prior to the making and transmittal of findings. Such delay would undermine the principal purpose of the Act: to provide a period of economic security during which an unemployed individual may seek new employment

without the immediate threat of pressing need. In addition, requiring the kind of evidentiary hearing appellants are seeking from the federal government would impose a serious administrative burden upon the latter.

Since appellants did not utilize existing administrative procedures in an attempt to change the federal findings with respect to the reasons for their discharge, they cannot now complain that those procedures would have been inadequate. If appellants had evidence to show that Christian's attendance record was satisfactory and that Green had not consumed alcoholic beverages within 24 hours of flight duty, they should have submitted it to their employing agencies. Had they done so, the agencies might have changed their findings to show that appellants' discharges were for reasons that did not constitute misconduct under New York law, and appellants then would have obtained unemployment benefits. Having failed to exhaust those procedures, however, appellants cannot now complain because they did not also have available the right to an evidentiary hearing.

2. *The lack of a hearing does not deny discharged federal probationary employees equal protection.* Appellants stress that unemployment compensation claimants discharged from non-federal service are granted a "fair hearing" on all issues relating to their entitlement to benefits (42 U.S.C. 503(a)(3)), that non-probationary federal employees in the competitive service may obtain a hearing to determine whether their discharge was for cause (*e.g.*, 5 C.F.R. 752.202), and that under the Secretary's regulations unemploy-

ment compensation claimants resigning from federal service are granted a hearing to determine the reasons for their termination from service (20 C.F.R. 609.18). They claim (Br. 30–40) that in these circumstances the absence of any hearing on the reasons for the termination of their federal service constitutes a denial of equal protection of the law. But the different classifications to which appellants point all have a reasonable basis and are therefore valid. *Jefferson* v. *Hackney,* 406 U.S. 535; *Richardson* v. *Belcher,* 404 U.S. 78; *Dandridge* v. *Williams,* 397 U.S. 471.

a. Federal and non-federal employees are covered by different unemployment compensation programs established at different times. The programs for non-federal employees are established under state law and administered entirely by the states. Since 1935, the costs of administering those programs have been financed by federal taxes on private employers, but the compensation payments themselves are funded by the states. See 42 U.S.C. 502(a) and 1101(c). The program for federal employees was established under federal law in 1954 and is administered by the states as agents of the United States under agreements with the Secretary of Labor.

Equal protection does not require these separate programs to employ identical fact-finding procedures. There is no reason why a federal employing agency, in reporting the reasons why an employee was discharged, must employ the same adjudicative procedures as an independent fact-finding tribunal, such as a state unemployment compensation agency. The federal employing agency is reporting facts known to its

officials or with which they have at least some acquaintance; flexible, informal investigative procedures may be more expeditious and just as accurate in such circumstances. Such findings were made final and conclusive on the state in order to avoid having a state agency review a federal agency's factual findings that affect only federal benefits.[8]

b. Appellants contend that only probationary federal employees are denied a hearing, for unemployment compensation purposes, with respect to the reasons for the termination of their federal service. This contention is factually incorrect, and involves a basic misunderstanding of the Secretary's regulations. Those regulations treat all federal employees, whether permanent or probationary, in the same manner. No hearing is required with respect to either group (20 C.F.R. 609.6) and the procedures for the correction of errors are also identical (20 C.F.R. 609.7–609.9, 609.20, 609.22–609.24). The intention of the Secretary was to avoid disturbing normal employee discharge procedures.

Two broad classes of federal employees may be discharged without a hearing. Employees, such as most lawyers, in positions excepted from the competitive service may be removed at the will of the appointing

[8] A comparable "finality" provision, governing findings as to the reason for discharge from the armed service, is part of the state-administered, federally-financed unemployment compensation program of the Ex-Servicemen's Act of 1958. See 5 U.S.C. 8523; 20 C.F.R. 614.8. This provision, like the "final and conclusive" provision in 5 U.S.C. 8506(a), reflects the legitimate federal interest in avoiding the friction entailed by state agency review of a federal agency's factual findings that affect only federal benefits.

officer. 5 C.F.R. 6.4; 5 C.F.R. 752.103(a). Probationary employees in the competitive service, such as appellants, may also be removed without a hearing. 5 C.F.R. 315.804; see also 5 C.F.R. 772.305(a). Discharged permanent employees, however, are entitled to a subsequent hearing on the propriety of their discharge. 5 C.F.R., Part 772; see, also, 5 C.F.R. 752.202. It is this distinction which is the real basis for appellants' claim that they have been uniquely denied a hearing.

The discharge hearing provided to permanent employees in the competitive service has little direct relationship to the making of findings under the Secretary's regulations. Those findings must be made immediately upon the discharged employee's request for unemployment compensation. 20 C.F.R. 609.6. This will normally be long before the completion of hearings, if any, conducted to determine whether the discharge was itself lawful. Thus the initial findings with respect to the discharged permanent employee in the competitive service, like those with respect to probationary employees and employees in excepted positions, will not be based upon a hearing. After that, the same provisions with respect to corrections of errors apply to all employees.

The fact that in some cases corrections of findings with respect to permanent employees may be made by the agency on its own initiative, on the basis of information developed in a hearing conducted later with respect to the different issue of the lawfulness of the discharge, does not create an invidious distinction. This distinction merely follows from the long-standing tenure distinction, established in the 1883 Civil Service

Act, 22 Stat. 404, between probationary and permanent employees.

Appellants do not challenge this basic tenure distinction or the propriety of summary discharges of federal probationary employees. It is well settled that such employees may constitutionally be discharged without a hearing. See, *e.g.*, *Jenkins* v. *United States Post Office*, 475 F. 2d 1256 (C.A. 9), petition for writ of certiorari pending, No. 72–1665; *Jaeger* v. *Freeman*, 410 F. 2d 528 (C.A. 5); *Levy* v. *Woods*, 171 F. 2d 145 (C.A.D.C.). This rule is rooted in the practicalities of administration. The first year of federal employment, the one-year probationary period, is a trial period during which the employee's qualifications may be judged. Civil Service tenure traditionally, and with good reason, has been earned only through the satisfactory completion of an extended period of service during which the employing agency has a fair opportunity to evaluate job performance. That evaluation historically has been left to the discretion of the employing agency.

Thus, the distinction between the hearing rights of permanent and probationary employees is reasonably grounded in the comparative effects such hearings have on the government's historic relationship with its employees. Permanent employees by definition have tenure; they may directly challenge the lawfulness of their discharge; and any information resulting from that challenge can, without otherwise disturbing the established relationship between the government and such employees, be used by an employing agency in correcting findings it has made for unemployment

compensation purposes. In contrast, probationary employees have no right to challenge the validity of their discharge and therefore should not be permitted to contest it, either directly or collaterally, in extended adjudicative proceedings which would interfere with the government's traditional right of summary discharge. Hearings held to challenge the federal findings under 5 U.S.C. 8506 would result in precisely such interference.

c. Following the decision in *Smith* v. *District Unemployment Compensation Board,* 435 F. 2d 433 (C.A. D.C.), the Secretary amended his regulations to provide that the federal employing agency's findings of the reasons for an employee's resignation must be made after a hearing. 20 C.F.R. 609.18. This distinction between discharges and resignations has a sound basis.

When an employing agency discharges an employee, it has acted affirmatively and knows the reasons for its own action. But when an employee resigns, the agency ordinarily will have no information concerning his reasons. Thus the normal internal procedures for determining the reasons for termination of service are by their very nature inadequate in cases of resignation. More elaborate procedures, at which the employee himself is present, are necessary to provide the agency with sufficient information to make findings. Thus reasons exist for holding a hearing with respect to resignations which do not pertain in cases of discharges.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

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AUGUST 1973.

APPENDIX

1. Amendment V to the Constitution of the United States, in pertinent part, provides:

> No person shall be * * * deprived of life, liberty, or property, without due process of law; * * *.

2. The Unemployment Compensation for Federal Employees Act, 5 U.S.C. 8501 *et seq.*, provides, in relevant part:

> § 8502. *Compensation under State agreement*
>
> (a) The Secretary of Labor, on behalf of the United States, may enter into an agreement with a State, or with an agency administering the unemployment compensation law of a State, under which the State agency shall—
>
> (1) pay, as agent of the United States, compensation under this subchapter to Federal employees; and
>
> (2) otherwise cooperate with the Secretary and with other State agencies in paying compensation under this subchapter.
>
> * * * * *
>
> (d) A determination by a State agency with respect to entitlement to compensation under an agreement is subject to review in the same manner and to the same extent as determinations under the State unemployment compensation law, and only in that manner and to that extent.
>
> * * * * * *
>
> § 8506. *Dissemination of information*
>
> (a) Each agency of the United States and each wholly or partially owned instrumentality

of the United States shall make available to State agencies which have agreements under this subchapter, or to the Secretary of Labor, as the case may be, such information concerning the Federal service and Federal wages of a Federal employee as the Secretary considers practicable and necessary for the determination of the entitlement of the Federal employee to compensation under this subchapter. The information shall include the findings of the employing agency concerning—

(1) whether or not the Federal employee has performed Federal service;

(2) the periods of Federal service;

(3) the amount of Federal wages; and

(4) the reasons for termination of Federal service.

The employing agency shall make the findings in the form and manner prescribed by regulations of the Secretary. The regulations shall include provision for correction by the employing agency of errors and omissions. Findings made in accordance with the regulations are final and conclusive for the purpose of sections 8502(d) and 8503(c) of this title. This subsection does not apply with respect to Federal service and Federal wages covered by subchapter II of this chapter.

* * * * *

§ 8508. *Regulations*

The Secretary of Labor may prescribe rules and regulations necessary to carry out this subchapter and subchapter II of this chapter. The Secretary, insofar as practicable, shall consult with representatives of the State unemployment compensation agencies before prescribing rules or regulations which may affect the performance by the State agencies of functions under agreements under this subchapter.

The Social Security Act of 1935, as amended, 42 U.S.C. 301, *et seq.*, provides, in pertinent part:

> § 503. *State laws, provisions required; stopping payments on failure to comply with law.*
>
> (a) The Secretary of Labor shall make no certification for payment to any State unless he finds that the law of such State, approved by the Secretary of Labor under the Federal Unemployment Tax Act, includes provision for—
>
> * * * * *
>
> (3) Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied; * * *
>
> * * * * *

3. Pertinent regulations of the Secretary of Labor, 20 C.F.R. 609.5, *et seq.*, provide as follows:

> § 609.5 Information to Federal civilian employees.
>
> Each Federal agency shall—
>
> (a) furnish information to its employees explaining their rights and responsibilities under the UCFE program and 18 U.S.C. 1919; and
>
> (b) complete Standard Form 8, "Notice to Federal Employee About Unemployment Compensation," in accordance with instructions thereon, and furnish a completed copy of such form to each employee at the time of separation from Federal civilian service, when transferred from one payroll office to another, or when the office responsible for distribution of the form is advised that an individual is on nonpay status for 7 consecutive days or more.
>
> § 609.7 Corrected Federal findings.
>
> If a Federal agency ascertains at any time within 1 year after it has returned a completed Form ES–981 to a State agency or the Secretary that any of its Federal findings were erroneous it shall promptly correct its error and

forward corrected Federal findings to the State agency or the Secretary, as appropriate.

§ 609.8 Answering requests for additional information.

On receipt of a request for additional information under § 609.22 a Federal agency except where it would be inconsistent with general policies followed in the case of separations for security reasons shall furnish in writing to the requesting authority such additional information as (1) will enable a Federal civilian employee to understand the basis for Federal findings or (2) will enable the requesting authority to correctly apply a State unemployment compensation law.

§ 609.9 Answering requests for correction of Federal findings.

On receipt of a request for reconsideration and correction of Federal findings under § 609.23 a Federal agency shall consider the information supplied in connection with such request and shall review its Federal findings. The Federal agency promptly shall correct any errors or omissions in its Federal findings and shall affirm, modify, or reverse any or all of its Federal findings in writing. The Federal agency then shall forward its reconsidered Federal findings to the requesting authority.

§ 609.10 Additional information to State agencies or Secretary.

In addition to the information required by §§ 609.6, 609.8, and 609.9 a Federal agency shall furnish to a State agency or the Secretary, as appropriate, any information which it is not otherwise prohibited from releasing by law which may be necessary for the administration of the UCFE program.

§ 609.18 Finality of Federal findings.

(a) Federal findings under § 609.6 or § 609.7 shall be final and conclusive except that Fed-

eral findings which contradict the reasons given by a Federal civilian employee for his resignation or which relate to the validity of such reasons shall not be final and conclusive unless such employee has been afforded an opportunity for a fair hearing on any issue involved in the alleged reasons for resignation. Such opportunity for hearing may be afforded by the Federal agency or the U.S. Civil Service Commission at any appropriate stage with respect to any personnel action, or upon request for reconsideration under § 609.23.

(b) Additional information submitted by a Federal agency under § 609.8 shall be considered part of the original Federal findings which, as so supplemented, shall be final and conclusive, as provided in paragraph (a) of this section.

(c) Federal findings which after reconsideration under § 609.9 have been affirmed, modified, or reversed by the Federal agency shall be final and conclusive, as provided in paragraph (a) of this section.

§ 609.20 Notice of determination.

A notice of determination or redetermination shall be given to a Federal civilian employee with respect to any determination or redetermination under § 609.19 or § 609.31. Such notice shall be given in the same manner as notice of determination or redetermination is given to claimants under the State unemployment compensation law. The notice shall include the Federal findings and shall inform the Federal civilian employee of his right to additional information or reconsideration and correction of such findings. The State agency shall set forth the Federal findings in sufficient detail to enable the Federal civilian employee to determine whether he wishes to request reconsideration or correction of any such findings.

§ 609.22 Procedure for obtaining additional information.

(a) ***Request by Federal civilian employee.*** If a Federal civilian employee needs additional information in order to understand the basis for a Federal finding in connection with a claim for compensation under the UCFE program he may file a request through the State agency, or the Secretary if the State agency does not determine claims under the UCFE program, for more specific information from the Federal agency which made such Federal finding. Such request shall be mailed by the State agency or the Secretary to the appropriate Federal agency. If notice of a determination of entitlement has been given to the Federal civilian employee before a request for additional information is filed, such employee must file concurrently with such request a timely appeal or request for redetermination under the State unemployment compensation law. No hearing on such appeal shall be scheduled before the State agency receives from the Federal agency the additional information requested.

(b) ***Request by State agency.*** If at any stage of determining a Federal civilian employee's entitlement to compensation a State agency, State administrative appeal authority (including the referee in the Virgin Islands), or the Secretary determines that Federal findings do not contain sufficient information to enable correct application of the State unemployment compensation law a request may be made for additional facts from the appropriate Federal agency.

§ 609.23 Procedure for obtaining correction of Federal findings.

(a) ***Request by Federal civilian employee.*** A Federal civilian employee who wishes a Federal agency to reconsider and correct Federal findings in connection with a claim for compensation under the UCFE program may file a

request for such reconsideration and correction, together with such information as supports his request, through the State agency before which the claim is pending or through the Secretary if the State agency does not determine claims under the UCFE program. Such request shall be mailed by the State agency or the Secretary to the appropriate Federal agency. If notice of a determination of entitlement has been given to the Federal civilian employee before a request for reconsideration and correction of Federal findings is filed, such employee must file concurrently with such request a timely appeal under the State unemployment compensation law. No hearing on such appeal shall be scheduled before the State agency receives from the Federal agency its reconsidered Federal findings.

(b) *Request by State agency.* A State agency, State administrative appeal authority (including the referee in the Virgin Islands), or the Secretary may request a Federal agency to reconsider and correct its Federal findings at any stage in determining a Federal civilian employee's entitlement to compensation.

§ 609.24 Procedure after correction of Federal findings.

(a) A State agency shall forward to the affected Federal civilian employee a copy of reconsidered Federal findings or additional information furnished by a Federal agency.

(b) If additional information or reconsidered Federal findings provide a basis under the State unemployment compensation law for the State agency to redetermine such employee's entitlement to compensation the State agency promptly shall make a redetermination and give notice thereof to the affected Federal civilian employee.

(c) If a State agency after reviewing additional information or reconsidered Federal

findings submitted by a Federal agency does not consider that there is a basis for making a redetermination the State agency promptly shall set a date for hearing the Federal civilian employee's appeal.

(d) If Federal findings are corrected under § 609.7 a State agency shall notify the affected Federal civilian employee of such correction. If the State unemployment compensation law permits and the corrected Federal findings afford a basis for such action the State agency shall redetermine such employee's entitlement to compensation and give notice of redetermination to such employee.

§ 609.25 Appeal by Federal civilian employee.

(a) A determination or redetermination by a State agency as to a Federal civilian employee's entitlement to compensation is subject to review, except for Federal findings which are final and conclusive under § 609.18, in the same manner and to the same extent as other determinations of entitlement under the State unemployment compensation law.

(b) A determination or redetermination as to entitlement to compensation by the Virgin Islands agency is, subject to the same exception with respect to Federal findings, as in paragraph (a) of this section, to be reviewed as provided in §§ 609.34 and 609.46.

§ 609.26 Disclosure of information.

Information received by a State agency in administering the UCFE program is confidential, and disclosure thereof is authorized, to the same extent as information received by such State agency in administering its State unemployment compensation law, or in the case of the Virgin Islands agency to the same extent as information received under the Virgin Islands unemployment compensation law.

U.S. GOVERNMENT PRINTING OFFICE: 1978